SUPREME COURT, U. S.
FEB 3
MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974
No. 74-961

PHOEBE WILSON DILLON, Petitioner,

-vs-

ANTLER LAND COMPANY of Wyola, a Montana Corporation; LITTLE HORN LAND COMPANY, a Montana Corporation, ANTLER LAND COMPANY, a Montana Corporation, LITTLE HORN LAND AND LIVESTOCK COMPANY, a Montana Corporation; UNION BANK AND TRUST COMPANY, Executor of the Estate of BERTHA TSCHIRGI; REX HIBBS, Executor of the Estate of F. M. TSCHIRGI; FRANCIS J. MURTHA, as Trustee for TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREA PENSION FUND; and the UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, PHOEBE WILSON DILLON, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case November 6, 1974.

OPINIONS BELOW

The opinion for the Court of Appeals for the Ninth Circuit affirming the Summary Judgment rendered by the United States District Court for the District of Montana, Billings Division, has not yet been reported and is set forth in the Appendix, infra, at pp. 1a - 15a. The opinion of the United States District Court for the District of Montana, Billings Division, is reported at 341 F. Supp. 734 (D.C. Mont. 1972) and is set out in the Appendix, infra, pp. 1b - 2c.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 6, 1974. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Crow Indians are barred by Montana statutes of limitation and laws of adverse possession from recovering their allotted fee lands conveyed to White Men contrary to the prohibition of Section 2, Act of June 4, 1920?

2. Whether a White Man can abort the trusteeship of the United States government over allotted Indian lands by fraudulently inducing the allottee to procure

issuance of a fee patent?

3. Whether the lower courts were correct in ruling that the United States government has no mandatory duty to litigate title to Indian Lands procured by White Men contrary to law and express Congressional prohibition?

UNCODIFIED ACTS, RULES AND STATUTORY PROVISIONS INVOLVED

Act of June 4, 1920, Sec. 2 (41 Stat. 695):

The pertinent provisions of Section 2 of the Act of June 4, 1920 appear in Appendix D at p. 1d.

Rule 12(b), Fed. R. Civ. P.:

The relevant portion of Rule 12 (b), Fed. R. Civ. P. appears in Appendix D at p. 2d.

United States Code, Title 25, Sections 185, 348 and 349:

Applicable provisions of the above Sections of the United States Code, Title 25, appear in Appendix D at pp. 2d - 4d.

STATEMENT OF CASE

This is an action brought by a competent Crow Indian pursuant to 28 USC § 1331 to recover lands allotted and patented to her in fee pursuant to the Crow Indian Allotment Act of June 4, 1920 (41 Stat. 695). The suit is a test case brought to determine whether the Crow Indians are barred by the laws of the State of Montana from recovering allotted fee lands unlawfully conveyed to the White Man, as well as the actionability of the United States , under the Federal Tort Claims Act, 28 USC § 1346(b), for it's failure to take steps necessary to set these conveyances aside. The facts, for the most part recited in the opinions below, are essentially undisputed.

In 1923 and 1924, Petitioner Phoebe Wilson Dillon, then a minor, was allotted trust patents to 1,040 acres of grazing land on the Crow Indian Reservation in the State of Montana. Upon receiving her certificate of competency in 1949 at age 34, Petitioner undertook management of her own affairs and leased her land to Matt Tschirgi, alter ego of ANTLER LAND COMPANY, one of the Defendants herein.

In 1955, Petitioner, desparately in need of money to cover her husband's medical bills, approached Tschirgi for an advancement on the rent, which he refused, except on condition that she apply for a fee patent on her land. When Petitioner

finally agreed, Tschirgi gave her $100, told her how to prepare the application and instructed her to falsely state that no one had imposed on her to apply for a patent in fee.

Petitioner's application for a fee patent was made on February 25, 1955. Prior to its issuance, however, on May 21, 1955, Petitioner entered into a written contract to sell the land for $7.00/acre to Tschirgi's corporation, Defendant ANTLER LAND COMPANY, once she obtained the patent. At the time of execution, Tschirgi paid her an additional $300 and promised, furthermore, that notwithstanding the written contract, he would pay Petitioner whatever figure the land was appraised at.

On October 3, 1955, a fee patent, issued September 19, 1955, was delivered to Petitioner. Three days later, on October 6, she executed and delivered a warranty deed to ANTLER LAND COMPANY.

All total, Petitioner received $3,711.00 in cash for her land which the Superintendent's office at Crow Indian Agency appraised at $10 per acre or $10,400.00. Upon discovery of the appraised value, Petitioner sought the difference from Matt Tschirgi without avail, he contending that she was bound by the May 21st contract.

Since delivering the deed to ANTLER LAND COMPANY in 1955, Petitioner has diligently sought assistance from numerous government

officials in the Bureau of Indian Affairs and Department of Justice in an attempt to have it set aside. The record discloses that on April 25 and September 11, 1963 and again on January 4, 1964, various government officers either suggested or recommended, that the United States should commence action to quiet the title in trust for Plaintiff. /Record at 90-94, 365/. Petitioner learned that the Department of Justice decided to drop her case on June 12, 1970. The instant action was subsequently filed by private counsel on July 20, 1970.

The Complaint states two claims for relief. By the first claim, Petitioner seeks to quiet title to the land in herself or United States, as her trustee, and to recover rents and profits. In support of this claim, three theories, all stemming from Petitioner's status as an Indian, are urged: first, that there was fraud which vitiated the patent from the United States to Plaintiff and the subsequent deed from her to ANTLER LAND COMPANY; second, that while the land was in trust status Plaintiff executed a contract to convey it which, under the provisions of the General Allotment Act (25 USC §348), made the subsequent deed invalid; and third, that ANTLER LAND COMPANY on the date of the delivery of the deed owned lands in excess of the acreage limitations contained in Section 2 of the Crow Indian Allotment Act of June 4, 1920 (41 Stat. 695) thereby rendering the deed null and void.

By her second claim, Petitioner seeks to recover $33,000.00 in damages from the United States pursuant to the Federal Tort Claims Act (26 USC §§ 2671-2680) It is Petitioner's contention here that failure of the Department of Justice to take action on her behalf to set aside the deed given ANTLER LAND COMPANY was in breach of a mandatory duty enjoined upon the United States by 25 USC § 185.

On motions for summary judgment directed to the first claim, the District Court held that the October 6, 1955 deed was voidable on the first and second theories advanced, and void under Section 2 of the Crow Act of 1920. It further held, however, that recovery on all theories was barred by the Montana Statutes of Limitation and that Respondents have acquired title by adverse possession against the Petitioner.

Although no motion to dismiss was properly interposed on Petitioner's second claim for relief, (See Rule 12(b), infra, Appendix D at p. 2d.) the lower court granted summary judgment in favor of the United States on It's Answer sua sponte holding that 25 USC § 185 imposes no mandatory duty upon the United States "to litigate the cases arising out of the dealings of emancipated Indians with fee lands and, second, because in any event the duties assumed could never be anything but a discretionary duty to which the Federal Tort Claims Act does not apply." /Record at 574/.

On November 6, 1974, the Ninth Circuit Court of Appeals affirmed the District Court's ruling on virtually identical grounds.

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S DECISION THAT STATE STATUTES OF LIMITATION CAN BE INVOKED TO GIVE VITALITY TO A VOID DEED AND TO BAR THE RIGHTS OF INDIANS IN THEIR RESTRICTED FEE LANDS IS WHOLLY UNPRECIDENTED

By the Crow Indian Allotment Act of June 4, 1920 (41 Stat. 695), as amended by the Act of May 26, 1926 (44 Stat. 658), Congress undertook allotment of Crow Reservation lands among members of the Crow Tribe. Section 1 of the Act provides for allotments in severalty to be evidenced by "patents in fee to competent Indians ... but by trust patent to minors and incompetent Indians, the force and legal effect of the trust patents to be as prescribed by the General Allotment Act of February 8, 1887 (Twenty-fourth Statutes, p. 388)," now 25 USC §§348 and 349 (infra, Appendix D at pp. 3d - 4d).

Section 348 essentially provides that the United States is to hold legal title

to the allotted lands "in trust" and continue to exercise its exclusive guardianship duties over the allottee and his lands for a period of twenty-five years. In the Matter of Heff, 197 US 488 (1904); United States v. Pelican, 232 US 442 (1913); Minnesota v. United States, 305 US 382 (1939). Section 349 further provides that at the expiration of the twenty-five year period, or sooner if the Secretary of the Interior determines that a given allottee is "competent and capable of managing his own affairs," a fee patent is to issue whereupon "... each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, under the state in which they reside."

Decisions of this Court have interpreted the language of Section 349 as meaning that the issuance of an unrestricted fee patent discharges the allottee and his land from federal guardianship status rendering him and his fee land subject to state laws. Dickson v. Luck Land Co., 242 US 371 (1917); United States v. Waller, 243 US 452 (1917); Larkin v. Paugh, 276 US 431 (1928). Because petitioner had applied for and received a fee patent to the lands she seeks to quiet title to here, both the District Court and the Court of Appeals were of the opinion that Section 349 and the above-decisions of this Court compel applying the five-year Montana Statute of Limitations for adverse possession to bar her requested relief.

Both courts failed to appreciate however, that because of Section 2 of the Crow Allotment Act of June 4, 1920, Crow lands, although patented in fee, are not unrestricted. Section 2 prohibits and declares void any conveyance of trust or fee patent land by a Crow Indian, whether directly or indirectly, to any person, company or corporation who owns more than 1,280 acres of grazing land, or who by such conveyance would become the owner of more than 1,920 acres of grazing land, within the boundaries of the Crow Indian Reservation. (See, infra, Appendix D at p. 1d). By amendment in 1940 only non-Indians are now prohibited from exceeding the acreage restrictions. Act of February 29, 1940 (54 Stat. 252).

Apparently, neither of the lower courts considered Section 2 as a restriction on the Indian's freedom to alienate fee patent lands. As the District Judge declared:

> In my opinion the effect of Section 2 of the Crow Act was to limit the power of a buyer to buy. The Indian was not forbidden to sell; /Record at 566/.

Nevertheless, the 1920 House and Senate Conference Report which accompanied enactment of Section 2 expressly declares that the law imposes a "limit ... /on/ the number of acres of land that any Crow Indian may sell...." Hearings on S. 2890, 66 Cong. 2d Sess. (1920).

Significantly, in Ewert v. Bluejacket, 259 US 129 (1922), this Court held that an action maintained by individual Indians to set aside a conveyance made in violation of a similar statutory prohibition against sale of Indian lands to non-Indians was not barred by laches or analogous state statutes of limitation. There, a Quapaw Indian conveyed Indian lands to a non-Indian, Ewert, employed as a Special Assistant to the United States Attorney General in Indian affairs. Seven years later, the grantor's heirs sought to cancel the conveyance on the grounds that it was illegal under a federal statute for the grantee to purchase Indian lands. Both the District Court and Eighth Circuit Court of Appeals held, however, that the action was barred by laches.

In reversing, this Court held:

> The purchase by Ewert being prohibited by the statute, was void. Weskey v. Hammer, supra /223 US 85/. He still holds the legal title to the land and the equitable doctrine of laches, developed and designed to protect good faith transactions against those who have slept on their rights, with knowledge and ample opportunity to assert the, cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards

> in lands subject to statutory restrictions. /citing cases/ 259 U.S. at 137-138 (emphasis supplied).

Moreover, two circuit courts, the Seventh and the Tenth, have also refused to apply state statutes of limitation to bar actions brought to recover restricted fee land. United States v. Schwarz, 460 F2d 1365 (7th Cir 1972); Garcia v. United States, 43 F2d 873 (10th Cir 1930). In Schwarz, the Seventh Circuit held that Wisconsin's ten and twenty year adverse possession statutes did not bar an action brought to quiet title on lands the fee patent to which contained a restriction against all alienation without consent of the President. In so ruling the Court declared:

> It has long been held that adverse possession under a state statute of limitation cannot run against Indians, if the land is not alienable by them, so long as such restrictions exist. United States v. 7,405.3 Acres of Land, 4 Cir, 97 F2d 417, 422-423 (1938).
> 460 F2d at 1371.

For similar reasons, the Court in Garcia, supra, held that New Mexico statutes of limitations were inapplicable to suits

maintained by the Puebloes to recover their fee lands since a federal statute, the Act of June 30, 1884, 4 Stat 430 /R.S. §2116/, restricting alienation of the fee carried with it the necessary implication that the lands were still restricted lands over which federal trust responsibilities had not been fully extinquished.

As the Conference Committee Report on S. 2890 reveals, the evident purpose behind enactment of Section 2 was to prevent large farming and ranching corporations from gobbling up land which was intended to help the Crows become self-sufficient. Since its enactment, however, the United States Government has failed to enforce the prohibition. Testimony taken during the mid-1950's in Congressional Hearings held to consider repeal of Section 2, disclosed the then deplorable state of affairs:

> What, then has actually happened? It is evident that, because of the failure of the Secretary of the Interior to enforce the provision of Section 2, the pitfalls which the Conference Committee predicted have actually occurred, both to the public and to the Indians.
>
> As a result of such non-enforcement, and as a further result of the failure of the Secretary of the Interior to disapprove sales of Indian lands when

> in violation of the restrictions of Section 2, one corporation alone has acquired and now owns 134,678 acres of deeded lands formerly allotted to and owned by members of the Crow Tribe. Another corporation has acquired, and now owns 38,459 acres of such lands, another 25,208 acres of such lands and a few other individuals own comparable acreages. Many of these tracts are key tracts of land. By key tracts I mean that such tracts of land control to stock watering and other necessary appurtenances in the respective areas.
>
> If this procedure is allowed to continue, the lands of the Crow Reservation will soon be in the hands of a few overlords, under a system whereby acquisition will continue to be made by sales held under depressed bidding conditions. Testimony of Edward E. Whiteman, Chairman of the Crow Tribal Council, Hearings on S. 332 and H. 2381 and 7255, Before the Special Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 85th Cong. 1st Sess. (1957).

Consequently, if the Crow Indians are to recover their fee lands from large operators such as Antler Land Company, which

held over 40,000 acres of former Crow deeded land in the year 1958, it will be because of private suits such as this. If the Ninth Circuit Court of Appeal's decision is allowed to stand, and the Montana statutes of limitation therefore permitted to perfect conveyances prohibited by the clear language and policy of Section 2, the courts will have effectively accomplished what Congress, in considering repeal of the provision, deliberately refused to do.

II.

CONTRARY TO THE DECISION OF THE APPELLATE COURT, THE EIGHTH CIRCUIT HAS HELD THAT A FEE PATENT PROCURED THROUGH FRAUD DOES NOT EXTINQUISH THE TRUST STATUS OF INDIAN LANDS SO AS TO SUBJECT THEM TO STATE LAW

In United States v. Debell, 227 F. 775 (8th Cir. 1915), the Eighth Circuit held that fraud practiced by a white man to induce a Sioux Indian to apply for a fee patent vitiated the validity of the patent and subsequent deed. In a suit prosecuted by the United States on behalf of the Indian to recover the land from the non-Indian grantee, South Dakota statutes of limitation were found not to bar the action.

Ignored by the Ninth Circuit, moreover, is an opinion of the District Court of Montana, itself, which has intimated that the unlawful issuance of a fee patent does not extinquish the trust status of Indian lands. Gerard v. Mercer, 62 F. Supp. 28 (D.C. Mont. 1945), revs'd on other grounds, sub nom Gerard v. United States, 167 F2d 951 (9th Cir. 1948). In that case, fee patents had been issued without the Indian having made application therefor. Upon issuance of a patent, the State of Montana taxed the lands and subsequently sold them at a tax sale. Twenty five years later, quiet title action was brought to recover the land.

In ruling on a motion to dismiss the Complaint because of the bar of the state statutes of limitations, the Court ruled:

> ... if the proof should show that the lands, or certain tracts thereof, were not lawfully acquired and that the United States is still holding them, as trustee under a restricted patent, then the rule /i.e. statute of limitations/ would not apply; .... 62 F. Supp. at 30.

The Ninth Circuit's ruling that a white man can abort the trusteeship of the United States government over allotted Indian lands by fraudulently inducing the allottee to secure issuance of a fee patent presents a compelling case, therefore,

for this Court to finally settle the important issue of whether or not the trust status of Indian lands can be extinquished by the unlawful issuance of a fee patent.

III.

PRIOR DECISIONS OF THIS COURT ESTABLISH THAT THE UNITED STATES GOVERNMENT HAS AN AFFIRMATIVE DUTY TO LITIGATE TITLE TO INDIAN LANDS WHERE THE VALIDITY OF THE FEE PATENT IS QUESTIONED OR IT APPEARS THAT THE LANDS ARE IN JEOPARDY OF BEING MISAPPROPRIATED

Section 185 of Title 25, United States Code, provides that federal agents "shall take such measures ... as may be necessary to protect ... /the/ Indian in the quiet enjoyment of ... lands ... allotted to him." (infra, Appendix D at p. 2d). The language is mandatory, the government "shall" protect the Indian's enjoyment of his land. Moreover, the statute uses the word "lands" when speaking of the object of the government's duty; it does not single out "trust lands" from "fee lands" for special protection. The fair inference is that the statute is meant to encompass both.

While this section does not, itself, "obligate" the government to "litigate" cases involving title to Indian lands,

decisions of this Court point to at least two cases where such a duty may arise. The first is illustrated by United States v. Beebe, 127 US 338 (1887), where the Court strongly charged the Government with not only the right, but the duty, to institute judicial proceedings on behalf of an Indian to set aside a patent issued him under fraudulent circumstances:

> If a patent is wrongfully issued to one individual, which should have been issued to another, or if two patents for the same land have been issued to two different individuals, it may properly be left to the individuals to settle, by personal litigation, the question of right in which they alone are interested. But if it should come to the knowledge of the Government that a patent has been fraudulently obtained, and that such fraudulent patent, if allowed to stand, would work prejudice to the interests or rights of the United States, or prevent the Government from fulfilling an obligation incurred by it, ... which personal litigation could not remedy, there would be an occasion which would make it the duty of the Government to institue judicial proceedings to vacate such patent. 127 US at 342 (emphasis supplied).

Accord., United States v. Minnesota, 270 US 181 (1925).

The second stems from the Government's trust responsibilities over Indian lands generally. United States v. Creek Nation, 295 US 103 (1935), is typical of these cases which recognize that while a federal trustee may have some discretion in the management of Indian trust lands, this discretion does not extend to permitting misappropriation or destruction of the trust res, itself:

> It did not enable the United States to give the tribal lands to others ... for that would not be an exercise of guardianship but an action of confiscation. 295 US 109-110.

Accord., Shoshone Tribe v. United States, 299 US 476 (1937); Seminole Nation v. United States, 316 US 286 (1942). Such guardianship duties, of course, are not extinguished by the mere fact of a fee patent having issued where, as in this case, the patent has been fraudulently obtained. United States v. Debell, 227 F. 775, supra, p. 14. C.f. United States v. Raiche, 31 F2d 624 (7th Cir. 1928).

Montana Power Company v. Rochester, 127 F2d 189 (9th Cir. 1942), relied upon by both courts below to hold that the United States has no duty to protect Indian lands once a fee patent has issued is not to the contrary. That case assumes a fee patent has validly issued and does not even indirectly

address the status of the Government's responsibilities when the patent itself is assailed.

If, as the lower courts have held, the Crow Indians are precluded from recovering their fee lands by Montana statutes of limitation, and the Government, who would not be so barred (See, e.g. Minnesota v. United States, supra, p. 9; United States v. Thompson, 98 US 486 (1879); Gibson v. Chouteau, 80 US 534 (1871)), has no mandatory duty to institute litigation to recover the lands on their behalf, the effect is to strip them of their federal guardian as well as their lands. The decision of the Ninth Circuit is clearly an anomaly, both as a matter of policy and of federal Indian law, so as to warrant invoking the supervisory jurisdiction of this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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By, WILLIAM L. MADDEN, JR.
Member of the Firm
(On the Petition for Writ of Certiorari)

DATED this_____day of January, 1975.

AFFIDAVIT OF PROOF OF SERVICE

STATE OF MONTANA)
) ss.
County of Yellowstone)

I, WILLIAM L. MADDEN, JR., an attorney duly authorized to practice law in the state of Montana and the Courts of the United States of America, and member of the firm of Towe, Neely & Ball, 2525 Sixth Avenue North, Billings, Montana, attorneys of record for PHOEBE WILSON DILLON, Petitioner herein, depose and say that on the_____day of January, 1975, I served a copy of the foregoing PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for The Ninth Circuit on the several parties thereto, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, First Class, postage prepaid, to:

Mr. Otis L. Packwood
United States Attorney
District of Montana
Federal Building
Billings, Montana 59101

2. On the United States, by mailing copies in a duly addressed envelope, with Air Mail postage prepaid, to:

THE SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
Washington, D. C. 20530.

Mr. Kent Frizzel
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

Messrs. George R. Hyde and
Glen R. Goodsell, Attorneys,
Department of Justice,
Washington, D.C. 20530

3. On the non-government Respondents herein, by mailing copies in a duly addressed envelope with First Class postage prepaid, to their respective attorneys of record, at their following addresses:

Rex F. Hibbs
Hibbs, Sweeney & Colberg
Mutual Benefit Life Building
Billings, Montana 59101; and

Cale Crowley
Crowley, Kilbourne, Haughey,
Hanson & Gallagher
500 Electric Building
P. O. Box 2529
Billings, Montana 59103.

William L. Madden, Jr.

SUBSCRIBED AND SWORN TO before me this_____day of January, 1975.

Notary Public for the State of Montana. Residing at Billings, Montana. My Commission Expires: 9/26/76.

(SEAL)